BEFORE THE COMMISSIONER FOR THE
TENNESSEE STATE DEPARTMENT OF EDUCATION

C. Petitioner, vs. Williamson County Schools, Respondent.	))))))))))	No. 06-27

FINAL ORDER

Petitioner' Attorney:

Marcella G. (Fletcher) Derryberry, Esq.
1139 Battery Lane
Nashville, TN 37220

Respondent's Attorney:

Emily R. Ogden, Esq.
SunTrust Bank Building
201 Fourth Ave. North, Suite 1500
P. O. Office Box 198615
Nashville, TN 37219

To protect the confidentiality of the student, he shall be referred to as "C" throughout the body of this decision.

FINAL ORDER # 06-27

INTRODUCTION

This due process hearing was held at the Williamson County Board of Education, September 25th and 26th, 2006. The initial request was filed by the father of C. as a *Section 504* Hearing Request and then amended to include *IDEA* Due Process issues.

C progressed through the general education curriculum and was not considered to be eligible for special education services. C was a participant in an altercation with another student. The school system determined that C's participation in the altercation was not a manifestation of his disability and therefore was not punishable within the limits of the *IDEA*. As a result of disciplinary actions, C was assigned to an "In- School Suspension," though being recorded in attendance for the school academic calendar reports. He has also been recorded and documented as continually progressing through the scheduled, general education curriculum. The only "unexcused absences" C accumulated on his academic record were due to his father withholding of C from Independence High School.

STATEMENT OF THE ISSUES

1. Whether there was a failure to refer, evaluate, and identify a child with a disability and provide an appropriate Individualized Education Plan (IEP).

2. Whether C was timely evaluated, following referrals and Parent's requests, from the sixth grade to the present: i.e. sixth, seventh, eighth and ninth grade.
3. Whether the Local Education Agency (LEA) timely informed Parents of their procedural due process rights including, but not limited to, the right to an independent evaluation (IE), if they disagreed with the denial of eligibility or the Agency evaluation.
4. Whether the failure to identify and implement an appropriate IEP or plan resulted in an incorrect "Manifestation Determination".

FINDINGS OF FACT

C was a sophomore at Independence High School in Williamson County, Tennessee at the time of filing. C has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), in-attentive type. C. was classified as a Section 504 student, instead of a student eligible under the Individuals with Disabilities Education Act. (IDEA). He has suffered from ADHD which has impacted his educational performance since the beginning of his school career. (Tr. V. 2, P. 132)

C was screened November 11, 1999 by the Nashville Metro School District in the third grade. It was noted that he scored high on the attention scale at school as well as high on the ADHD scale, depression, and adaptability at home. It was noted that with major modifications C could be successful in a regular classroom. A referral was made to his physician for ADHD screening. (Ex. 2, P. 0005)

C attended a private school for his fifth year of school, with educator recommendation to be retained. Parents sought private testing to determine the reason C was having difficulty mastering necessary skills for successful completion of the fifth grade. (Tr. V. 2, P. 134)

C was tested by Bowie Reading & Learning Center, Inc. in April 2002. His Intelligence Quotient (IQ) was found to be 143 on the WISC-III. The test revealed significant discrepancies in several areas of achievement including basic reading, written expression, and progressing speed. The Bowie report also noted a high index for ADHD. Reports stated, "By virtue of his higher cognitive scores and the difference between his academic achievement scores and WISC-III score, C meets the State of Tennessee statutory criteria for Gifted/Learning Disabled in several areas." (Ex. 2, P. 0037-0059) According to the cumulative results, C is eligible for certification as gifted/learning disabled.

Within months after the Bowie report was done, C began school in the sixth grade at Heritage Middle School in the WCS. The Bowie Report and the Metro Screening were provided to the Williamson County School (WCS). These reports should have put WCS on notice of C's special education eligibility at the beginning of his sixth grade school year (Tr. V. 2, P. 138). The Parent completed a student referral, given to the General Education Intervention Team (GEIT), together with permission for initial screening (Ex 2, at 84-85). As is customary, when a new student enrolls in Williamson County Schools, the first step in the identification process is to try to address student needs through interventions in the general education curriculum. (Hr'g Tr. Vol 3 at 313-315). The initial screening consisted of direct observations by C's teachers. (Ex. 2 at 71-73).

Based on these direct observations, and the Bowie Report, the GEIT team met in September 2002 and developed interventions to address C's needs. (Exh. 2, at 76-83). Concerns noted in the minutes of the meeting state in part, "Do we need to consider Sp. Ed. Services for gifted, OHI, LD?" (Ex. 2, P. 76) However, the School District failed to follow the process of determining if C was eligible for special education services.

At the end of the sixth grade, the Parent stated in writing, "I do not want to wait three (3) months and delay this process again. I want to leave this meeting with a scheduled certification meeting and a scheduled IEP meeting that would include Dr. Bowie." Again, the WCS should have been on notice of C's potential eligibility, the parental request for evaluation, and special education services under an IEP. (Ex. 2, P. 81). At the second GEIT meeting in April 2003, the Parents presented a typed-written list of concerns to the school which became a part of the school record. (Tr. V. 2, P. 143).

In May of 2003, at the request of the parents, it was agreed to reassess C's plan and look at the possibility of special education eligibility (Hr'g Tr. Vol. 2, at 144-146). A Prior Written Notice was completed and signed by the father, which indicate the Parent's Rights and that Parent's Rights were simultaneously given and received. (Hr'g Tr. Vol. 2, at 100). The Parent was told that the first step towards eligibility was to have a medical diagnosis on file, which the parent presented to the school system on May 20, 2003. (Hr'g Tr. Vol 2, at 145). The medical diagnosis was for ADHD. (Exh 2 at 112) Parents were interested in eligibility as Other Health Impaired (OHI) Learning Disabled (LD), and/ Gifted. (Exh.2, at 113-114). Dr. Martha Johnson explained the State of Tennessee's criteria in each of these areas and explained that C did not have qualifying scores to be considered gifted. (Exh, 2 at 114).

At the May 2003 meeting, on completion of the sixth grade, WCS asked the Parents to provide documentation of C's ADHD. It was provided the same day. Dr. Long, with Old Harding Pediatric Associates, diagnosed C with ADHD. His prognosis is "Good w/resource teacher and meds." Dr. Long examined C on 12-23-02 and prescribed Concerta medication. (Ex. 2, P.112) Based on C's difficulty with educational performance, as documented as early as the third grade of elementary school, along with the certifications of his physicians, he is eligible and qualifies for certification as Other Health Impaired.

On September 2, 2003, the beginning of the seventh grade, without any further testing or interventions, the WCS met and determined "based on reports completed outside of school system and supplied by parent," this Student did not meet the eligibility requirements for special education or for *Section 504*. (Ex. 2., P. 131). C was tested by WCS on August 24th and 26th , 2004, two years after receipt of appropriate testing and evaluation reports and a proper request for evaluation from the Parents. (Ex. 2, Pp. 144-50). Again, the Parents provided a doctor's statement documenting their son's ADHD. Dr. Fiscus gave him a diagnosis of "ADD- inattentive predominate" with recommended modifications of school program "per IEP." (Ex. 2, P. 136) Based on C's difficulty with educational performance, beginning identification as early as the third grade, and the certifications from treating physicians, C qualified as eligible for certification Other Health Impaired.

Dr. Shawn Stewart, a credible witness, explained the differences in these scores and determined the lower score could be either a result of trauma or simply be invalid, based on other factors such as attention problems. He states the tests are designed to

protect from a false top or bottom and one cannot fake a 'high number'. In response to Ms. Fletcher's questions the doctor stated: (Tr. V.1, Pp. 34-35)

> A. ...And so to see a 22-point shift in one direction is extremely rare, and so would bring to account that something is an interfering variable. Now, given that tests themselves are designed to protect from either having a false bottom or a false top, the suspect test—and not even because Dr. White and Dave, but because of the way the tests themselves are designed. The suspect test would be the lower of the two, because it is difficult to near impossible to get a high score unless there's biasness in the testing.

In September of 2003, at the beginning of C's seventh grade year, the team re-convened. On September 2, 2003, C's father received, as evidenced by signature, A Prior Written Notice, which includes the "Parent's Rights". (Exh. 2, at 121). At this meeting, C's eligibility status was discussed based on the Bowie Report, testing done by the school, and teacher observations. (Exh. 2, at 130). At this time, the team determined the best course of action was to "continue to follow the regular seventh grade plan, which was still a "*Section 504 Plan*". (Exh 2, at 130)

At the follow-up GEIT meeting, for the beginning of C's 8th grade year of school, a comment was made that the Bowie Report was now three years old; it was agreed a re-evaluation would be appropriate. (Exh, 2, at 137). A psycho-educational evaluation was conducted by qualified school personnel to determine if C qualified for special education services, based on the medical diagnoses of ADHD (inattentive type), and/or qualify as Gifted. (Exh 2, at 144-150). A team met at Heritage Middle School on August 30, 2004 to review and discuss the evaluations and to decide whether C was eligible for special education services. (Exh 2, at 151). After significant discussion, the team concluded C

was not eligible for special education services because his needs were being met in the general education curriculum. His scores and performance in the classroom were enough evidence not to provide special education services. (Exh 2, at 151-153, CK DP Rrg Tr. Vol 3 at 298-299) However, the appropriate analysis is not whether the student is progressing from grade to grade, but whether he is in need of specialized education. (See *34 CFR 300.101 [2006]*)

On February 28, 2005, a "*504 meeting*" was held to discuss high school for C. At this meeting, the high school counselor, John MCQuary, expressed concern that C did not have an IEP. He stated in the minutes: "I would support an IEP where he will have someone check with him on a daily basis." The team decided that a *Section 504 Plan* would be appropriate for C to give accommodations to help him succeed in the eighth grade. (Tr. Vol 3, at 317). These accommodations included extra time on homework and tests, daily checkout with instructors for organizational support, incentives for completing assignments, and weekly contact with parents as needed. (Hrg Exh 2, at 156). The plan was implemented the rest of the eighth grade year. However, the Court finds that the District used the wrong reasons for developing a *504 Plan* in that modifications must be made for daily assistance and not for the purpose of "high stakes testing".

C started his ninth grade year at Independence High School in August 2005. School staff asked father to have a meeting to review C's *Section 504 Plan*, but C's father responded he would like to see what C could do on his own. However, in December of 2005, C's father was concerned about some of C's grades (though all were still average to above average) and requested a meeting. (Hrg vol. 2 at 193-194) The District should have implemented the *504 Plan*, regardless of what father thought, because this is a team

decision; not a unilateral decision for the parent to make. As a general rule, the school is the professionals and should not rely on undocumented beliefs of parents. During the *Section 504* meeting in December of 2005, the team, including the father, agreed to accommodations for C which included (1) having his agenda (where he wrote down his assignments) signed daily by parents; (2) attending "after school tutoring" sessions, if needed; and (3) alerting his parents if he was struggling academically or behaviorally. (Hrg Exb 2 at 190). Much expectation was placed on C to ensure the items were followed. As a high school student, C should be taking responsibility for his own success (Hr'g Exh 2, at 190). C's father agreed and signed this plan (Hr'g exh 2, at 190).

On January 11, 2006, C was involved in an altercation with another student, during his 8th period study hall. (Hr exh 2, at 200; Hrg Tr. Vol. 4 at 493-494). Following some verbal banter, C slapped the other student with his hand twice and hit him in the face with a closed fist once, which C admitted, verbally and in a written statement, to the teacher and school administrators. The other student did not strike C. The teacher informed an administrator later, the same afternoon, of the incident; and remarked neither student got up from his seat during the altercation. (Tr. Vol. 4 and 493-495) The first-year teacher was in the hall disciplining another student when this incident occurred. The following day, C was charged with "zero tolerance" by Assistant Principal Ferguson. Without having a manifestation determination meeting, or taking any other action to determine his *special education* or *504 status*, Ferguson assigned C to twenty (20) days at the "Alternative School". (Ex. 2, P. 200)

On Thursday, January 12th, the administration investigated the altercation and decided a *Manifestation Determination* meeting would need to take place because of C's

status as a *504 student.* (Tr. Vol 4 at 494-497). The parents were telephoned in reference to the situation. and the school administrators met with C's father the same afternoon to inform him of the typical punishment for this infraction and advise him of the manifestation meeting scheduled. (Hrg Tr. Vol. 4 at 496-497).

On Friday, January 13th, a team. including Marilyn Webb (principal), Brian Ferguson (Assistant principal), Shawn Carter (counselor), Janet Anthony (school psychologist), Jess Woodard (intern), Katie Berger (general education teacher), C, and C's father convened to determine whether this was a "manifestation of C's ADHD", inattentive type. (Hr'g Exh. 2 at 211). First, the team reviewed the details of the altercation occurrence. (Hr'f Exh. 2 at 211). Next, they examined the *two prongs* of a *manifestation determination*- i.e. 1.) Whether the behavior (the fight) was caused by the failure to implement the *Section 504 Plan*: and 2.) Whether the incident was directly related to C's disability – i.e. ADHD inattentive type. (Hr'g Tr. Vol. 4, at 475-476). There was discussion as to whether C was on his medication during the incidental time. (Hr'g Tr. Vol. 4, at 476; Hr'g Exh. 2 at 212). Based on the discussion regarding the medication. Ms. Anthony decided that in order to have all the relevant information in making their decision, it was important for the team to hear from C's treating physician, Dr. Fiscus. (Hr'g Tr. Vol. 3, at 345-346). Thereupon, it was agreed Ms Anthony would speak to Dr. Fiscus and the team would reconvene the following week. (Hr'g Vol. 3, at 346).

At this subsequent meeting. the school psychologist, Ms. Anthony, recounted her conversation with Dr. Fiscus .(Hr'g Exh. 2, at 213). Dr. Fiscus informed C's ADHD was based on inattention, not compulsivity or hyperactivity. (Hr'g Exh. 2 at 213). This

finding was consistent with the medical diagnosis considered preiously, a year and a half earlier, by the team when creating the *Section 504 Plan*. There was discussion regarding C's grades (i.e. 3 C's and 3 B's which evidenced academic progress). (Hr'g Exh. 2 at 213).The school psychologist opined, based on Dr. Fiscus' opinion, that the question of "whether C was on or off his medication" would not be a culminating factor in determination of this incident- the doctor would not support the statement "because C. did not take his Statera, this happened."(Hr'g Exh. 2, at 213; Hr'g Tr. Vol. 3, at 346). Ms. Anthony discussed the proposal of putting some coping mechanisms in the *Section 504 Plan*. (Hr'g Exh. 2 at 213). C's father requested quantifiable items on the *Section 504 Plan* at this manifestation meeting. The team agreed to look at future revisions, though they felt C was properly identified and served under his *Section 504 Plan*. (Hr'g Tr. Vol. 3 at 349 – 350). Finally, C again told the team exactly what occurred and admitted his actions were not acceptable behavior for a high school student. (Hr'g Exh. 2 at 214). Based on this information, the team determined the altercation was not a *manifestation* or *proximate result* of C's ADHD, inattentive type. (Hr'g Tr. Vol. 4 at 477). In fact, even the C's agreed. (Hr'g Tr. Vol. 4, at 478; Hr'g Tr. Vol. 3, at 348).The team determined this was not a Manifestation of C's ADHD because he was diagnosed with "inattentive type". However, Dr. Stewart testified the inattentive type of ADHD does not preclude a student from being impulsive. He states: (Tr. V. 1 2, Pp.66-7)

> In individuals who are ADHD, inattentive, their brain is more active than most people's are at all times. So that does preclude them, but it increases a likelihood that they're going to have reactive impulsivity. So if something happens, if I'm asked to make a decision in the moment, I'm more prone to do so in an impulsive manner. So I'm more prone to maybe say something that I shouldn't say. I may act in a way that I wouldn't hope that I would if I was

given more time to think about the behavior rather. So in those situations. even somebody who is inattentive-type ADHD is still prone to impulsive behavior.
Q. And would that kind of student, once engaged in a behavior. have greater difficulty—
A. Pulling out.
Q.—pulling out?
Ayes.
Q.And that would be his ADHD?
A. Yes.
Q. Yes.
A. that's a typical pattern. That whether it's ADD or ADHD, students who struggle with either when they're in a situation are apt to act impulsively within that situation.
Q. Is that evidenced by poor judgment?
A. It's reaction time. What allows us to delay consequences or delay decision making is a very important thing. It's cognitive process. It's an amount of time between when I have a thought and when I act. And so if my brain is so fast that I don't think or I can't think before I do something. I act impulsively. That's the definition of impulsivity, not forethought, a behavior without forethought.
Q. And ADHD, inattentive –type, have that same problem?
A. Yes.

The offending behavior was a manifestation of his disability. as Dr. Steward states

(Tr. V.1 2. P.71)

Q. So in reviewing the records that you have in this manifestation determination, just if all he had were ADHD, you would have found that to have been a manifestation, the incident?
A. Yes.
Q. Because? Help us to understand that.
A. Because it was a reflex impulsive behavior. By all accounts. this was a situation where C. and the other student were going back and forth between each other. When talking to C., when actually examining the situation, C. admits it was a behavior that if he had thought about he would not have done it. It was impulsive by nature, knowing that it is a symptom of his identified disability. And you put two and two together. you get one is a manifestation of the other.

The Parents asked for a Disciplinary Hearing Meeting, which is not part of the *504* or *IDEA* processes, and same was held January 23, 2006. At that time C was found guilty of fighting and his punishment was reduced to twenty (20) "In-School" suspension days. (Ex. 2, P. 221)

On March 8, 2006, the school system a request was presented, by and through parent's attorney, for C to again be evaluated, a functional behavior assessment be conducted, and a behavior intervention plan be developed. (Hr'g Tr. Vol. 3 at 352-353). The team met on the first mutually available date, April 7, 2006, to discuss this evaluation request as well as C's behavior and to decide if there was a legitimate need for a behavior plan. (Hr'g Tr. Vol. 3 at 353). The team discussed C's behavior and agreed, that other than the isolated incident, C was not displaying any behavioral problems. (Hr'g Tr. Vol. 3 at 354). The team concluded that a behavior plan was not appropriate at this time. (Hr'g Tr. Vol. 3 at 355).

CONCLUSIONS OF LAW

It is conceded C has a disability, given the medical diagnosis of *ADHD*. However, the school district failed, on diagnosis, to certify C as eligible for special education services. Chronologically, the District should have found C eligible before his entrance into 7th grade of school.

To decide the *first prong* of the test for special education, inquiry must answer whether C meets the eligibility for one of the categorical diagnoses. One such categorical diagnoses listed in the *Individuals with Disabilities Education Act (IDEA)* is "*Other Health Impaired*" of which Attention Deficit Hyperactivity Disorder falls:

Other Health Impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that-

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia: and

(ii) Adversely affects a child's educational performance.

In order for a child, diagnosed with *ADHD,* to qualify under the criteria established by the Department of Education, his/her condition must limit the child's alertness to such a degree that it adversely affects educational performance.

In determining special education services eligibility, one must also examine whether there is a need for special education services for the child with an eligible diagnosis-which is the *second prong* of *IDEA* eligibility. It is well settled that a student is not eligible for services under the *IDEA* unless the student has been identified as having a disability and "who, by reason thereof, needs special education and related services." *34 CFR Section 300.7(a)*

"**Special education**" is defined as "specially designed instruction," which means:

Adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction- **(i)** to address the unique needs of the child that result from the child's disability; and **(ii)** to ensure access of the child to the

general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. (*34 C.F.R. section 300.26*)

Therefore, in order for C. to qualify as a student with a disability pursuant to *IDEA*, C. must require "*specially designed instruction*" in order to have access to, and benefit from, the general education curriculum.

The law governing the initial evaluation in *IDEA* is very clear. The Parent may make a referral for a special education evaluation and the time frame for the school district to complete the evaluation is sixty (60) Days from the consent by the Parents. *20 U.S.C.A§ 1414*

(a) **Evaluations**, parental consent, and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph subsection (b) of this section, before the initial provision of special education and related services to a child with a disability under this part.

(B) Request for initial evaluation consistent with subparagraph (D), either a parent or a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(C) Procedures

(I) In general

Such initial evaluation shall consist of procedures—

(I) to determine whether a child is a child with a disability (as defined in section 1401 of this title) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and

(II) to determine the educational needs of such child.

This court reviews the test for when a procedural violations result in a denial of FAPE. The court in Baltimore City Bd. Of School Com'rs v. Taylorch, 395 F. Supp.2d 246. 248-49 (D.Md.2005), states:

> Denial of a FAPE
> [1]The Supreme Court has developed a two-part test to determine whether a student has been denied a FAPE. Bd. Of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L. Ed.2d 690 (1982). Applying this test. a court first asks whether the educational authority has "complied with the procedures set forth in the Act," and then inquires whether "the [IEP] developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits". Id. At 206-07, 102 S.Ct. 3034. If those requirements were met. then the State has provided the child with a FAPE.
>
> As the ALJ noted. the plaintiff BCPS conceded that its failure to convene to evaluate Isobel's educational needs on receipt of the October 7, 2003 letter constituted a procedural violation of the IDEA. Taylorch, OAH No. MSDE-CITY-OT-04-20285 at 10. This procedural violation alone can constitute a failure to provide a FAPE. See Tice By and Through Tice v. Botetourt County Sch. Bd., 908 F.2d 1200, 1206 (4th Cir. 1987) (noting that "failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that a school failed to provide ...a FAPE"). However, BCPS argues that its procedural violation did not constitute denial of FAPE because the Parents did not show that Isobel suffered an educational loss as a result. This Argument fails because the procedural error here precluded the development of an IEP at all. When defining a test for the denial of a FAPE in Rowley, the Supreme Court noted that the first step of the inquiry includes the requirement that the court "determine that the State has created an IEP for the child in question..." Rowley, 458 U.S. at 206 n. 27, 102 S.Ct. 3034. The Fourth Circuit has agreed, holding that the failure to formulate and IEP. as a result of procedural error or otherwise, constitutes clear

denial of a FAPE. See e.g., Tice, 908 F.2d at 1207 (stating that a failure to implement and IEP left "simply no question" as to denial of FAPE); Gadsby by Gadsby v. Grasmick, 109 F. 3d. 940, 950 (4th Cir. 1997) (explaining that "central to the provision of a free appropriate public education is the development of an IEP", and finding a violation of the IDEA because BPCS failed to develop an IEP for the student in question).

In this case, it is clear that BCPS's procedural violation resulted in its failure to develop an IEP. Therefore, the ALJ was correct in finding that "the procedural violation... clearly resulted in a denial of FAPE." Taylorch, OAH No. MSDE-CITY-OT-04-20285 at 12.

The Sixth Circuit sets out the standards required to comply with IDEA. They state in Deal v. Hamilton County Bd. Of Educ. 392 F. 3d 840. 853-54 (6th cir. 2004):

> There are two parts to a court's inquiry in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); McLaughlin v. Holt Pub. Sch. Bd. Of Educ., 320 F.3d 663, 669 (6th Cir.2003). Second the court must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 207, 102 S.Ct. 3034; accord Kings Local Sch. Dist., Bd. Of Educ. V. Zelazny, 325 F.3d 724, 729 (6th Cir.2003). Parties challenging and IEP have the burden of proving by a preponderance of the evidence that the IEP devised by the school district is inappropriate. Zelazny, 325 F.3d at 729; Dong ex rel. Dong v. Bd. Of Educ. Of the Rochester Cmty. Sch., 197 F.3d 793, 799 (6th Cir. 1999). See also Babb v. Knox County Schools, 965 F. 2d 104, 109(6th Cir. 1992) which holds that strict compliance with the procedural safeguards governing evaluation is required and a failure to do so can be a per se violation of the Act.

The Ninth circuit clearly states the failure to appropriately develop an IEP is more than the measure of a student's academic progress and can result in a denial of FAPE. The Court states in W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992):

> When a district fails to meet the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE. The significance of the procedures provided by the IDEA goes beyond any measure of a child's academic progress during the period of time at issue. As the court in Rowley said,

"Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." Rowley, 458 U.S. at 205-206, 102 S. Ct. at 3050-51.

If the procedural violations have resulted in substantial harm to the student or his parents, relief should be granted. Metro Bd. Of Public Educ. v. Guest,193 F. 3d. 457, 464-65(6th Cir. 1999). "Substantial harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. See W. G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23, 960 f.2d 1479 (9th Cir. 1992). In addition, procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under IDEA. See Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 2001).

The federal regulations provide: 34 CFR 300.101 Free Appropriate Public Education (FAPE). **(c) Children advancing from grade to grade. (1) Each state must ensure that FAPE is available to any individual child with a disability who needs special education and related services ,even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade. (2) The determination that a child is eligible under this part must be made on an individual basis by the group reasonable within the child's LEA for making eligibility determinations.** (Emphasis Added)

Therefore, even though a child is performing at grade level and advancing from grade to grade, the child may be eligible under *Part B of IDEA* for special education and related services, including identification as child with a specific learning disability.

The Court takes exception with the District's opinion that this Court is forbidden from requiring training of school personnel. The *IDEA* at *20 USC 1415* specifically

grants an administrative tribunal the authority to fashion whatever remedy is needed and appropriate.

ANALYSIS

Persuasive evidence from the academic record of C indicates ADHD has adversely affected his educational performance. C has generally performed at or above grade level expectancies. At the end of his sixth grade year, he received two B's and two C's. (Hr'g Exh. 2 at 117). At the end of the seventh grade year. three B's and one C- are indicative of progress from the previous year. (Hr'g Exh. 2 at 134). His grade averages, at the end of his eighth grade year, were three B's and two C's, which included two advanced classes. (Hr'g Exh. 2 at 173). The report card for May 2006 indicated he earned an A, three B's, and two C's. which included enrollment of three advanced classes. (Hr'g Exh. 2 at 232). The parents and Dr. Stewart testified to not believing C was accomplishing his full potential.

The *Individuals Disability Education Act* allows a two-year statute of limitations for bringing claims. Under this act. *20 U.S.C. §1415 (f) (3) (C),* Petitioner would like to argue he was not aware of his rights. and therefore the statute of limitations should not be applied; however. as brought out in the hearing, Petitioner knew his rights and received his rights throughout his interactions with Williamson County Schools. Whether the statute of limitations applies or does not apply. this Court does not have to reach that decision. The Court finds that the District has continuously been out of compliance in that the District refused to find this child eligible and did not provide an Individualized

Education Plan (IEP) for this child for the entire period of time he has been in the School District. Accordingly, remedies are limited to the last two years.

It appears any contention on the part of Petitioner that he did not receive his parental rights is incredible. The Prior Written Notice form given to the parent on 5-20-03 explicitly stated that if the parent disagreed with school plan, the parent could choose another IEP meeting, mediation, or a due process hearing. (Hr'g Exh. 2 at 103.) Father signed this Prior Written Notice, which also states that a copy of Parental Rights was given to him that includes, in detail, the full array of rights available to him. (Hr'g Tr. Vol. 2 at 188-190). Parent was also given his rights in September of 2003, the beginning of C's seventh grade year. (Hr's Exh. 2 at 157-158).

In his testimony the father admits to receipt: "**Q.** So you were given your rights in the seventh grade and in the eighth grade, correct?" **A.** "We signed a piece of paper, yes." (Hr'g Tr. Vol. 2 at 190).

To contend that C's father did not read the parental rights or know what they meant is hard to believe. C's Father is to be commended for the interest, concern, and knowledge regarding the education his son is receiving. Based on the father's own testimony, he researched extensively, even nationally, which school system would provide C the best education. (Hr'g Tr. Vol. 2 at 135-136). When his son got in trouble at school, he spent "hours and hours reading up on every detail" in the student manual, "did e-mail searches on the Internet, Internet searches." (Hr'g Tr. Vol. 2 at 173-174). This attention to detail is inconsistent with any statement that he signed a document entitled "Parental Rights" but did not read it. Furthermore, at some point in this process, it appears he discovered the rights and hired an attorney to file for due process.

The school district maintained C's father had superior knowledge of the intricacies of special education law. While C's father may have more knowledge than the typical parent, that fact does not abate the responsibility of the school district. The Act imposes upon the school district the responsibility to carry out the law; and not the parent. The District raises the point that the father was "in charge" or "made the decision"; again this fact does not excuse or diminish the District's responsibility to the child. At other times it appears, the District wants to rely on its superior knowledge and ignore the parent's input. It cannot be both ways.

In reference to the *Manifestation Determination*, the team first examined whether C's conduct was a direct result of the school's failure to implement his benefits pursuant to the *Section 504 Plan*. (Tr. Vol. 3 at 350). The team determined that the *Section 504 Plan* was being implemented and C's fight was not a direct and proximate result of the school's failure to have C (1) sign his agenda book; or (2) go to tutoring; or of (3) the Local Education Agency contacting the parents because C. was struggling academically or behaviorally.(Hr'g Tr. Vol. 4 at 475-476). However, the underlying violation of failing to develop an appropriate IEP supersedes the question of whether the *504 Team* correctly determined manifestation.

C's diagnosis was ADHD and medication was prescribed, however, he was not properly identified and served as a child with disabilities. The first documented psychological was presented to WCS during C's sixth grade year. The Local Education Agency did not provide an appropriate program when it did not timely identify the student's disabilities and provide an *IEP*. See, *20 U.S.C.A. § 1415 (K)*.

Dr. Fiscus, the certifying physician, stated C needed an IEP at the time of the altercation. Further, Dr. Stewart stated the impulsivity of C's ADHD was sufficient to account for the offensive behavior, during the altercation, to support a manifestation of C's (yet to be identified) disability under the IDEA. However, WCS failed, over a period of years, to develop and implement an IEP for this student.

As a result of WCS's failure to identify this student as a student with disabilities and develop an IEP that would meet his needs, he has suffered substantial harm and has been denied FAPE. The Williamson County School District has clearly misapplied or ignored *34 CFR 300.101* and C has suffered harm. The proof for the District demonstrated that C was making average grades. However, as per *34 CFR 300.101* that is clearly not the standard under federal law.

Dr. Stewart describes the harm he saw when working with this student. He states: (Tr. V. 1,Pp. 50-1)

> **A.** I would say that C is a student who has struggled academically and shows the psychological impact of that struggle. He doubts his academic prowess. He's concerned. He doesn't feel that he's as smart as he is. He doesn't feel that he can achieve at the level that I would hope him to achieve. He doubts that. I see C as a student who reports himself as getting bored quite frequently and really not very interested in school at this point because of his doubting himself. I would – if not knowing his scores and having met him and just asking, I would say this is a lower performing student just on his presentation style because of the way he presents himself, talks about his achievements, talks about school. This is not a student that would be a typical pattern of a student who has been provided all the opportunities to succeed in a school environment.

The Parent signed the referral form for an evaluation on September 12, 2002. The eligibility determination did not occur until September 2, 2003 one year later. At the time the WCS would not do testing for another year. Instead, WCS relied upon an invalid rejection of results from extremely highly qualified evaluator, one of whom is presently

the Director of Psychology for a neighboring school system. After almost one year, the WCS denied C's eligibility based on the Bowie Report that the parents had provided, and paid for, when their son entered this school system in August 2002.

These procedural violations are at the heart of IDEA: (1) failure to identify and evaluate fully in a timely manner: (2) failure to develop and provide an IEP which is reasonably calculated to provide an educational benefit and (3) failure to provide the parents with procedural due process rights when services are denied. As noted above, clearly, these issues are crucial to IDEA and if violated result in a total denial of FAPE. The Parents sought help from the school system for their son. They even had him tested at their own expense and provided that report to WCS. The WCS did not have to rely on that report but they chose to do so rather than conduct a psychological test themselves.

Dr. Stewart states very clearly what areas should have been identified based on the Bowie Report. He states in response to Ms. Fletcher's questions: (Tr. V. 1.Pp.42-3)

> **Q.** If you had this documentation [doctor's statement} and you had this Bowie report and you were part of an IEP team, would you find this child to have a disability?
> **A.** Yes.
> **Q.** What would you find this child to have?
> **A.** Well, I would recommend that this child be certified, would be the way that I would state that.
> **Q.** What would he be certified as if that's all you can in terms of psychologicals?
> A. If this was what I was looking at, I think if I was on the GEIT team meeting, the IEP meeting, what would I recommend is either we accept the assessments of the Bowie Report and we look at, obviously, who did them and what the results were found, or would recommend that we ourselves do follow-up assessments and try to clarify information that maybe we didn't understand in the report or we didn't think would be replicated in an active situation. But, in general, my recommendations would be to certify due to the complex nature of the interaction effects of what seems to be multiple certifications: that being, obviously, other health impairments. ADD, ADHD, inattentive—well, at that time it wasn't inattentive. It was just ADHD, gifted, and potential learning disability.

When the Parent continued to ask for help from grade six through the ninth grade and into this Due process Hearing, each time WCS puts it off until the next year. The last IEP meeting at Heritage Middle School on February 28, 2005, ended with the minutes reflecting that the team should convene in high school to develop an IEP for this student. At this meeting, the High School Counselor, John McQuary, stated that he would support an IEP where he [C] will have someone check with him on a daily basis. That did not happen either.

As a result of WCS's failure to identify this student as a student with disabilities and develop an IEP that would meet his needs, he has suffered substantial harm and has been denied FAPE. Dr. Stewart describes the harm he saw when working with this student. He states: (Tr. V. 1 Pp. 50-1)

> A. I would say that C. is a student who has struggled academically and shows the psychological impact of that struggle. He doubts his academic prowess. He's concerned. He doesn't feel that he's as smart as he is. He doesn't feel that he can achieve at the level that I would hope him to achieve. He doubts that. I see C. as a student who reports himself as getting bored quite frequently and really not very interested in school at this point because of his doubting himself. I would – if not knowing his scores and having met him and just asking. I would say this is a lower performing student just on his presentation style because of the way he presents himself, talks about his achievements, talks about school. This is not a student that would be a typical pattern of a student who has been provided all the opportunities to succeed in a school environment.

ORDER

IT IS HEREBY ORDERED THAT the Student is eligible for special educational services under IDEA as Other Health Impaired. Learning Disabled and Intellectually Gifted.

IT IS FURTHER ORDERED THAT the School System shall develop an appropriate IEP within 60 days. including an appropriate program of positive behavior supports. Dr. Stewart shall be retained by the WCS to be a member of the IEP team.

IT IS FURTHER ORDERED THAT the School District will provide compensatory education and services to C for one year in the form of tutoring before and/or after school as determined by the IEP Team. The IEP Team shall determine from a range of 1-3 hours per week for a school year for the compensatory services.

IT IS FURTHER ORDERED THAT the Student's disciplinary record shall have expunged from any reference to this incident and any punishment imposed. The attendance record does not need to be amended as to the days C's father kept his son at home.

IT IS FURTHER ORDERED THAT the petitioners are the prevailing party.

ORDERED AND ENTERED this the 15TH day of June 2007.

WILLIAM JAY REYNOLDS
ADMINISTRATIVE JUDGE

CERTIFICATION

I hereby certify that a true and exact copy of this FINAL ORDER has been MAILED on the 15 day of June 2007 to the Counsel for the School District and to Counsel for the Parent.

WILLIAM JAY REYNOLDS